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In The

Supreme Court of the United States

October Term, 1979

No. 79-1976

JOHN RAYMER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.; THOMAS THOMPSON and NORTH BRANCH ROAD CORPORATION,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The petition of John Raymer ("Raymer") seeks review of an order and decision of the Court of Appeals for the Fifth Circuit (Kravitch, Cir. J.) dated April 8, 1980 (615 F.2d 241; A1).[1] By its opinion the Fifth Circuit affirmed, in all respects, a judgment (R21)[2] entered, after a jury trial in the Eastern District of Texas, on March 20, 1978, in this constitutional libel action. The order

1. "A" references are to Petitioner's Appendix.

2. "R" references are to the Record on Appeal to the Fifth Circuit, Volume I.

of the Fifth Circuit also upheld the district court's grant of summary judgment to respondent Doubleday & Company, Inc. ("Doubleday") on March 20, 1978 (R21) pursuant to an order dated February 6, 1978 (R75-76) dismissing Raymer's complaint, as well as the order dismissing all but one of Raymer's claims for alleged libel (R18).

COUNTER-QUESTION PRESENTED

The thirteen questions presented for review in Raymer's petition (P2-4)[3] raised many issues which had no bearing on the disposition of this case at either the trial or appellate level. Respondents therefore restate, pursuant to Rule 40(3) of the Supreme Court Rules, the counter-question presented for review as follows:

> Whether the courts below properly interpreted the libel laws of Texas in holding that six of the seven allegedly libelous statements were, as a matter of law, not defamatory, and that the seventh allegedly libelous statement was not libelous *per se*.

COUNTER-STATEMENT OF THE CASE

Raymer, a municipal police sergeant, brought suit for libel, claiming that he had been defamed by certain passages contained in Chapter 35 of *Blood and Money* (the "Book"), written by Thompson and published by Doubleday. North Branch was joined as the holder of the copyright in the Book (R52-54, 252).

Blood and Money is a non-fictional account of the suspicious circumstances surrounding the death of Houston socialite, Joan Robinson Hill, and the subsequent murder of her

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3. "P" references are to Raymer's petition for a writ of certiorari.

husband, Dr. John Hill, a prominent plastic surgeon in Houston. Both deaths were widely publicized and aroused great public interest (R174-175).

Dr. Hill was tried for the murder of his wife. After a mistrial was declared, and while awaiting retrial, Dr. Hill was murdered. Bobby Vandiver confessed to the murder, and turned State's evidence in the investigation into a suspected conspiracy led by Joan Hill's father. While free on bail, Bobby Vandiver was fatally shot by Sergeant Raymer in a Longview, Texas bar (R175). Raymer's libel claims were based on the account, in Chapter 35 of the Book, of the circumstances surrounding the Vandiver shooting.

Respondent Thompson, a renowned author and investigative journalist, spent almost two years researching the Book, during which time he interviewed Raymer at least three times (R176-177, 185-186). Thompson's notes from these interviews revealed that Raymer himself furnished the factual basis for much of the material in the seven passages to which Raymer objected.

Following comprehensive discovery, respondents moved for summary judgment (R254-255). In granting this motion dismissing the complaint in its entirety as to Doubleday and in part as to the other respondents, the district court held that petitioner was a "public official" subject to the "actual malice" standard of proof set out in *New York Times v. Sullivan*, and stated that petitioner had failed to provide any "convincing proof" that the statements complained of were published with knowledge of falsity or reckless disregard of the truth (R12-20).

As to Thompson and North Branch, the district court dismissed, as a matter of law, six of petitioner's seven counts for libel. The case proceeded to trial upon the court's finding that the one remaining passage (A22) presented an issue of fact for the jury as to truth, falsity and constitutional malice (R12-20).

After a three day trial, the jury returned a verdict of nonsuit in favor of Thompson and North Branch (R34). Because the jury did not consider the complained of passage to be defamatory, it never had to reach the issues of falsity and "actual malice" (R34). Parenthetically, we note that the findings of no defamation by both the court and jury rendered irrelevant the question of whether Raymer was a public figure subject to the *New York Times v. Sullivan* standard of proof.

As stated earlier, the Court of Appeals for the Fifth Circuit affirmed the decision of the district court (A1). Applying the Texas definition of libel, the court held that six of Raymer's seven claims of alleged libel were not actionable as a matter of law. As to the one claim which was submitted to the jury, the court found that the passages were ambiguous and so could not be considered libelous *per se*. The court approved the submission of the passages on which the seventh claim was based to the jury, and found that the jury had been properly charged (A12).

REASONS FOR DENYING THE WRIT

I.

The only issue properly before this Court is whether the courts below properly interpreted the libel laws of Texas in holding that six of the seven allegedly libelous statements were, as a matter of law, not defamatory, and that the seventh allegedly libelous statement was not libelous *per se*.

In an attempt to obscure the simple issue presented below, Raymer's petition (P2-4) now seeks review of a number of issues which were never before the district court or the Fifth Circuit. Specifically, Raymer's objections to the application of the *New York Times v. Sullivan* standard of proof (P2-4), to the admission and exclusion of certain testimony concerning the author's motives and intent (P3), and to the standard of proof

governing the recovery of exemplary damages (P4) are not properly before this Court for review. None of these issues played any part in the disposition of this case below. Determinations of motive, intent, "actual malice", "public figure" status, and standards of proof do not become relevant until defamation has been established. Raymer's case began and ended with the finding by the courts and jury that none of the complained of passages were defamatory.

It is axiomatic that, absent extraordinary circumstances not present in this case, the Supreme Court will not consider a question which was not passed on by the lower court. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397-398 (1971); *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The propriety of granting review in this case should, therefore, be guided only by consideration of the one issue presented in this brief and addressed in Point II herein.

II.

The Supreme Court's established policy of non-interference with determinations of state law by a court of appeals would be contravened by the granting of Raymer's petition, since the court of appeal's disposition of this case was based solely on its interpretation of Texas libel laws.

The remaining issues presented in Raymer's petition are all challenges to the application by the court of appeals of the relevant Texas libel laws.

The petition (P2-4) restates, in several ways, Raymer's attacks on the dismissal of six of his seven claims for libel. In dismissing the claims, the courts below did no more than apply the rules governing libel actions in Texas, as set out in *Newton v. Dallas Morning News*, 376 S.W. 2d 396, 398 (Tex. Ct. Civ. App. 1964). *Newton* established that in Texas the court must find that a passage is capable of a defamatory meaning before the passage may be submitted to the jury (A11). The district

court and the court of appeals agreed that six of the complained of passages failed to meet the legal threshold mandated by *Newton.*

Similarly, the district court's refusal to charge the jury that the seventh passage complained of constituted libel *per se* (and the court of appeals' concurrence on this point) was based on its determination that, under Texas law, a libelous *per se* instruction may not be given if the court considers the complained of statement to be ambiguous (A12). *Newton* at 400; *Root v. Republic National Bank of Dallas,* 337 S.W. 2d 709 (Tex. Ct. Civ. App. 1960). The district court and the Fifth Circuit both agreed that the statements in the seventh passage complained of were ambiguous, and thus were properly submitted to the jury (A12).

In cases such as this, where the court of appeals' opinion is founded squarely on its interpretation of state law, the Supreme Court has consistently declined to step in to upset such a determination. *Commissioner v. Estate of Bosch,* 387 U.S. 456, 462 (1967); *The Tungus v. Skovgaard,* 358 U.S. 588, 596 (1959). Neither the facts nor the legal issues involved in the instant petition present any extraordinary reason for the Supreme Court to depart from this policy of deference to the courts of appeals in matters of state law.

Respondents respectfully request the right to brief these matters should this Court grant Raymer certiorari.

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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